



July 13, 2017

CERTIFIED MAIL: 7005 1820 0000 3674 7808

RETURN RECEIPT REQUESTED

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Box 7611 Ben Franklin Station
Washington, D.C. 20044-7611
Re: DOJ No. 90-5-2-1-10459

CERTIFIED MAIL: 7005 1820 0000 3674 7815

RETURN RECEIPT REQUESTED

Director, Air Enforcement Division
Office of Civil Enforcement
U.S. EPA Headquarters, MC 2242A
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

CERTIFIED MAIL: 7005 1820 0000 3674 7822

RETURN RECEIPT REQUESTED

Chief, Air and TRI Section
Enforcement Division
U.S. Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, CA 94105

**RE: Consent Decree No. CV-15-02206-PHX-DLR – Lead-Based Paint
Abatement Mitigation Project Force Majeure Notice**

To whom it may concern:

In accordance with the ASARCO LLC Consent Decree No. CV-15-02206-PHX-DLR Appendix A.I.1, ASARCO LLC is submitting a Notice of Force Majeure Event in connection with the Lead-Based Paint Abatement Mitigation Project.

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Lead-Based Paint Abatement Mitigation Project Force Majeure Notice
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If there are any questions please contact Amy Veek at (520) 356-3296.

A handwritten signature in black ink, appearing to read "Joseph A. Wilhelm". The signature is fluid and cursive, with the first name "Joseph" being more prominent.

Joseph A. Wilhelm
General Manager
Hayden Operations

JAW/rcg

Enclosure

NOTICE OF FORCE MAJEURE EVENT

On July 7, 2017, as provided in Paragraph 85 of the Consent Decree entered in *United States v. ASARCO LLC*, No. CV-15-02206-PHX-DLR, entered December 30, 2015, Asarco identified to EPA an event that may cause delay in performance of an obligation under the Consent Decree. In accordance with Paragraph 86 of the Consent Decree, Asarco hereby provides “an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; ASARCO’s rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of ASARCO, such event may cause or contribute to an endangerment to public health, welfare or the environment.”¹

I. THE CONSENT DECREE EXPLICITLY PROVIDES THAT ASARCO IS RESPONSIBLE FOR FUNDING THE LEAD PAINT ABATEMENT PROJECT AND THAT GILA COUNTY IS RESPONSIBLE FOR IMPLEMENTATION.

Section VII. of the Consent Decree sets forth the requirements Asarco must meet with respect to (1) the Environmental Mitigation Projects. Paragraph 36 provides in pertinent part that Asarco “shall implement” the Projects “in compliance with the terms of this Consent Decree and Appendix A.” That paragraph further provides that Asarco shall spend “not less than \$2,000,000” on the Project. Paragraph 37 establishes recordkeeping and reporting requirements. Paragraph 38 requires Asarco to certify that it is not otherwise required to perform the Project. Paragraphs 40 and 41 require Asarco to include in communications related to the Project that it was required

¹ Paragraph 86 also provides that Asarco submit to EPA “documentation supporting the claim that the delay was attributable to a force majeure.” Asarco is in the process of collecting such information and will provide it under separate cover.

by the Consent Decree and submit a final report upon completion of the Project, respectively. Paragraph 39 states that because the Project “will require the contribution of funds to other entities that will carry out the [project],” these entities “must, in writing to EPA: (a) identify its legal authority for accepting such funding; and (B) identify its legal authority to conduct the [Project] for which ASARCO contributes the funds.” (Emphasis added).

Appendix A provides definitively that an entity other Asarco is responsible for project implementation. Appendix Z requires that Asarco, with EPA approval, enter an escrow agreement with the “Director of the Gila County Public Health Service and a third party financial institution “identified by the Gila County Environmental Health Services.” Appendix A further states that the escrow agreement “shall specify that the Gila County Environmental Health Services shall spend the full amount of the special fund for one or more of” specified projects. (Emphasis added.) One such project allows Gila County Environmental Health Services to be paid “up to 10% of Project Dollars, including but not limited to salary, travel, and equipment expenses” as administrative costs.

Thus, the Consent Decree makes clear that Asarco is responsible solely to placing funds in escrow and reporting on Project completion. Gila County has sole responsibility with respect to the Project details identified by EPA. This division of responsibility was not accidental, but was part of the total agreement that allowed the Consent Decree to be entered. As is abundantly clear from nearly every page of the Consent Decree, when Asarco agreed to perform a task and where EPA insisted that Asarco perform a task, the Consent Decree language makes that explicit.

II. APPLICABLE STANDARD FOR FORCE MAJEURE.

Paragraph 85 of the Consent Decree defines force majeure as “any event arising from causes beyond the control of ASARCO, of any entity controlled by ASARCO, or of ASARCO’s contractors that delays or prevents the performance of any obligation under this Consent Decree despite ASARCO’s best efforts to fulfill the obligation.”

III. **ASARCO USED ITS “BEST EFFORTS TO FULFILL ITS OBLIGATIONS AND HAS NO CONTROL OVER THE GOVERNMENT ENTITIES DECISIONS NOT TO IMPLEMENT THE PROJECT.”**

As required by Paragraph 39 of the Consent Decree, Asarco worked with Gila County to investigate and prepare appropriate written certifications to EPA that the County had legal authority to accept funding from Asarco for the Lead-Based Paint Abatement Project and that the County has the legal authority to conduct the Project. On August 1, 2016, Gila County submitted a letter to EPA and Asarco certifying that Gila County had the legal authority to accept funds for and to conduct the mitigation project. See attached letter.

During the months of first and second quarters of 2016, Asarco worked with officials from Gila County to prepare Project plans for EPA's review and approval. Asarco had discussions with Michael O'Driscoll from the Gila County Health Services Department to identify the County's existing resources and to accumulate existing materials related to lead-based paint abatement. The materials included a document prepared by the Gila County Department of Health & Emergency Management, entitled, "Gila County Lead-Paint Testing Program," which provided information on the abatement of residential lead-based paint and appropriate disposal requirements. The County and Asarco also consulted materials prepared by the U.S. Department of Housing and Urban Development related to the assessment of risk and inspection of dwellings

for lead-based paint. In accordance with Section VI. of the Consent Decree, on June 16, 2016, Asarco submitted the Project plan to EPA for review and approval.

On August 8, 2016, Asarco and EPA had a conference call to discuss EPA's initial comments on the Project plan. On August 12, 2016, EPA emailed their comments to Asarco. Asarco discussed EPA's comments with Michael O'Driscoll, who is the head of the County Health Department. Mr. O'Driscoll explained the County's resource limitations and its experience with respect to the items included in EPA's comments. Asarco, Gila County, and EPA subsequently engaged in a series of communications designed to address EPA's technical comments and Gila County's concerns regarding the scope of its financial and human resources available to undertake the project.

Two noteworthy issues arose during the course of the discussions. First, it became apparent that it would be necessary for a professional lead paint abatement contractor to be retained to develop a project work plan that adequately addressed EPA's technical comments. But, Gila County indicated that it lacked the resources to fund the retention of such a contractor and Asarco did not appear to have a mechanism for receiving "Project Dollar" credit if it expended funds for such an effort before an EPA-approved project plan and escrow agreement were in place. Ultimately, Asarco agreed to fund the plan development and defer resolution of any questions regarding reimbursement. Second, Asarco raised questions concerning EPA's apparent expectations of the extent to which Asarco could direct, and was responsible for, the details of Gila County's implementation of the project. For example, Asarco explained to EPA that, as a private party, it has no legal authority to mandate that Gila County solicit bids or select contractors in any particular manner, impose insurance requirements, implement community

involvement, or obtain access to properties. Again, Asarco agreed to table those issues in the interest of moving the project forward.

Moreover, Asarco reached out to individual Gila County Supervisors, who were ultimately responsible for determining whether the County would implement the project, to explain the project's purpose and its benefits to the community, and to provide assurance that Asarco was funding all required costs. Asarco followed up repeatedly with the County in an effort to prompt the County's commitment to implement the project. While awaiting that decision from the County, Asarco submitted to EPA a revised Lead-Based Paint Abatement Project Plan on April 12, 2017.

On April 19, 2017, Gila County informed EPA and Asarco that it was not able to undertake the project. EPA indicated its view that Asarco should substitute itself for Gila County as the entity that would implement the project. On May 12, 2017, Asarco explained to EPA why the Consent Decree did not impose such obligations on Asarco and why Asarco did not believe it appropriate for Asarco to do so. Asarco further indicated that it had contacted the Arizona Department of Health Services ("ADHS") to solicit that entity's willingness to undertake the project and requested that EPA do the same with the U.S. Department of Housing and Urban Development. ADHS informed Asarco on May 12 that it had initiated internal discussions of Asarco's request. ADHS posed questions regarding the project to which Asarco responded on May 15, 2017. On May 16, 2017, Eric Thomas, Chief of ADHS's Office of Environmental Health, informed Asarco that ADHS would not be able to undertake the project due to its current and anticipated workload.

On May 23, 2017, EPA provided Asarco comments on the revised project plan and indicated that the resubmitted plan would need to identify the "implementing entity" for the

project. On May 24, 2017, Asarco's government relations representatives met with officials in Arizona Governor Ducey's office for assistance in persuading ADHS to undertake the project. On June 28, 2017, Asarco's government relations representatives and Asarco personnel met again with officials in Arizona Governor Ducey's office. ADHS officials also attended this meeting. Asarco awaits further a decision from ADHS. On July 7, 2017, Asarco submitted a further revised plan that reflected its inability to identify an "implementing entity." Finally, Asarco has initiated discussions with Central Arizona Governments (www.cagaz.org), a regional planning organization serving Gila and Pinal Counties, to determine if the CAG would agree to be the implementing entity for the project.

Asarco does not believe that this force majeure event "may cause or contribute to an endangerment to public health, welfare or the environment."